116 U. S. 491.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~385~~ 114

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs

JAMES M. RYAN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 14, 1882.

SUPREME COURT OF THE UNITED STATES.

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No. 387.

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs.

JAMES M. RYAN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JAMES M. RYAN *vs.* E. M. DUNPHY.

Be it remembered that among the records and proceedings now remaining on file in this court in the above-entitled action are the following, to wit:

On the 16th day of December, A. D. 1879, the plaintiff filed his complaint in this cause, which is as follows, to wit:

Complaint.

In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JAMES M. RYAN, Plaintiff, *vs.* ELIJAH M. DUNPHY, Defendant.

The complaint of plaintiff alleges that heretofore, to wit, at Helena, Montana Territory, on the first day of June, 1879, said defendant, Elijah M. Dunphy, under the style and designation of "E. M. Dunphy," for value received, made, executed, and delivered
2 to this plaintiff his certain promissory note, in the words and figures following, to wit:

HELENA, M. T., *June* 1, 1879.

On or before December the 1st, 1879, I promise to pay James M. Ryan, or order, the sum of one thousand five hundred and eleven & $\frac{50}{100}$ dollars ($1,511.50), for value received.

E. M. DUNPHY.

That said note is now due, and the whole thereof, together with interest since maturity, is unpaid. Wherefore plaintiff prays judgment against said defendant for said sum of one thousand five hundred and eleven & $\frac{50}{100}$ dollars, and costs of suit and legal interest.

E. W. & J. K. TOOLE,
Plaintiff's Att'ys.

TERRITORY OF MONTANA, *Lewis & Clarke County:*

James M. Ryan makes oath & says: He is the plaintiff; that he has heard read the foregoing complaint and knows the con-
3 tents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

JAMES M. RYAN.

Subscribed and sworn to before me, this 16th day of December, 1879.

JOSEPH K. TOOLE,
Notary Public.

And on the 22d day of March, 1880, the said defendant filed herein his answer to the said complaint, which is as follows, to wit.

Answer.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

And now comes the defendant above named, by his attorneys, Chumasero & Chadwick, and, for answer to the complaint herein—

4 Admits the execution and delivery of the said note by defendant to the said plaintiff.

Admits that the said notes have not been paid.

And, for a further answer herein, and for a cross-action and counter-claim, defendant alleges that on the — day of February, A. D. 1879, William A. Rumsey and Jeremiah Embry were the owners and in the lawful possession of certain placer mining ground, with the water rights, flumes, and appurtenances, situate in the Grizzly Gulch, Minnesota mining district, county & Territory aforesaid, and which is more particularly described as follows, to wit:

One placer mine, being in Griz-ly Gulch, Minnesota mining district, county of Lewis & Clarke, Montana Territory, known as Embrey's discovery claim, and claim one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9), above said discovery; and claims numbered one (1), two (2), three (3), four (4), five (5), and six (6), below said discovery; also discovery claim in last gulch, and claim number one (1) above and number one (1) below said discovery: also all of claims numbers one (1) and two (2), in Schaffer's Gulch, being four hundred (400) feet along the gulch

5 and running from rim to rim, according to the mining laws of said gulch, together with one cabin standing thereon, and all ditches and water rights and privileges, together with tools, boxes, and mining implements thereunto belonging to said ground and mines.

And that this defendant was negotiating for the purchase thereof.

And defendant further alleges that on or about the date last above mentioned, at the request and instance of the said plaintiff, the following contract was made and entered into by and between the parties to this action, to wit:

The said defendant was to effect the purchase of the two-thirds of the above described property upon the best terms possible, exercising & using his best judgment for the joint use and benefit of said plaintiff and defendant; that the title thereto and all deeds of conveyances for the said interest in and to said premises and property were to be taken in the name of the defendant herein, and that the plaintiff herein was not to be known in the transfers and purchase until such time as the purchase was completed & all of the conveyances executed, & when so completed & a good & sufficient

6 title acquired to said property by defendant, the defendant

was to make and deliver to the said plaintiff a good and sufficient deed of conveyance for the undivided one-third thereof; and that upon the execution and delivery of such deed the said plaintiff promised and agreed to pay to this defendant the one-third of all moneys paid by him as the consideration for such conveyance and transfer, and the one-half of all expenses incurred and paid in and about obtaining the title to the said property as aforesaid. And this defendant further alleges that upon the 24th day of February, 1879, he obtained a warranty deed duly executed from the said Jeremiah Embrey to this defendant, the consideration for the said Embrey interest being the sum of twenty-six hundred dollars.

And the said defendant further alleges that upon the 14th day of December, A. D. 1878, the said William A. Rumsey and his wife executed and delivered to this defendant a warranty deed for the undivided one-half of the said premises to secure the payment of several sums of money, amounting in the aggregate to the sum of

7 $1,500.00, then due to this defendant, this defendant executing and delivering to the said Rumsey a bond to reconvey the said property so conveyed by deed of December 14, 1878, upon the payment of said indebtedness. And that afterwards, to wit, on the 26th day of July, A. D. 1879, the aforesaid bond of reconvey was cancelled and annulled, and defendant's title to the said one-half so conveyed to the said defendant by said Rumsey became perfect and complete. That to obtain the cancellation of the said bond as aforesaid this defendant had to assume, pay off, and discharge indebtedness and liens against the said Rumsey and his interest in the said property, amounting to the sum of $2,600.00, including the sum named in said deed, to wit, $1,500.00.

And the defendant further alleges that he paid, laid out, and expended in and about acquiring the title to the said property as aforesaid the sum of $2,200.00.

And defendant further alleges that, upon the 26th day of July, 1879, aforesaid, his title to the said premises was complete and perfect, and upon that day the said plaintiff was indebted unto this

8 defendant under the said contract on account of the said purchase and expenses in the sum of nineteen hundred and thirty-five $\frac{61}{100}$ dollars, and on that day he made and executed, together with his wife, a good and sufficient deed conveying to the said plaintiff an undivided one-third of said property, and tendered the same to the said plaintiff, and demanded from said plaintiff the payment of the last-named sum of money. That the said plaintiff refused to receive the deed and refused to pay the said sum of money, denying the existence of the aforesaid agreement, which said deed the defendant now brings into court.

Defendant avers that by reason of the premises and the facts above set forth the said plaintiff was indebted to this defendant on the said 26th day of July, 1879, and before the commencement of this suit, in the sum of $1,935.61.

Wherefore the defendant herein prays judgment against the said plaintiff for the amount of $1,935.61, with interest thereon from the 26th day of July, 1879, at the rate of ten per cent. per annum

after deducting the amount due on the said notes set forth in the said action besides his costs.

CHUMASERO & CHADWICK,
Defendant's Attorneys.

9 TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

Elijah M. Dunphy, being duly sworn, says: I am the defendant named in the action above entitled. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated to be alleged upon information & belief, and as to those maters I believe it to be true.

E. M. DUNPHY.

Replication.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

Now comes the plaintiff and for replication to the answer on file herein, and denies that on or about the time alleged in said answer, or at any other time, the defendant at the instance or request of this plaintiff, made or entered into the contract in said answer
10 mentioned, or any other contract with this plaintiff, concerning the purchase of said property.

Denies that plaintiff ever had, or ever was to have, any interest in said property in said answer described.

Denies that said defendant was to make to this plaintiff any deed or conveyance of said premises.

Denies that plaintiff ever promises or agreed to pay said defendant one-third of all moneys paid by him as alleged, or to pay him any other sum, or any portion of any expenses incurred or paid in or about obtaining title to said property.

Denies that on the 26th day of July, A. D. 1879, said plaintiff became and was indebted to the defendant in the sum of nineteen hundred and thirty-five & $\frac{61}{100}$ dollars, or any other sum under the contract in said answer alleged, or otherwise, on account of the purchase in said answer alleged, or on any other account.

Denies that said plaintiff was indebted to said defendant in any sum whatever.

Wherefore plaintiff prays judgment as in his complaint asked.

E. W. & J. K. TOOLE,
Plaintiff's Attorneys.

11 Here follows verification in due form.

Whereupon the defendant, to maintain the issues made and presented in his answer, placed him upon the stand and asked him the several questions shown by and stated in his bill of exceptions No. 1, which is as follows:

Bill of Exceptions.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

Be it remembered, that on the — day of May, 1881, this cause came on to be heard before a jury, whereupon the defendant, to maintain the issues made by his answer, placed upon the stand as a witness Elijah M. Dunphy, and asked him the following questions:

1. You will state whether, in the month of February, 1879, you entered into any contract or agreement with the plaintiff in regard to the purchase of the mining ground in Griz-ly Gulch, Minnesota district, Lewis & Clarke county, Montana Territory?

To which the witness answered: "I did enter into a contract with plaintiff verbally. There was no written agreement." The
12 defendant then asked witness the following question:

Ques. You will please state what the contract was.

The plaintiff objected to the witness answering said question, for the reason that the agreement, not being in writing, is void by the statute of frauds.

The court sustained the objection, and refused to permit the said witness to answer the question.

To which ruling of the court the defendant then and there duly excepted.

The defendant then offered, the witness being on the stand, to prove the truth of the matters set up in his answer.

Plaintiff objected; the court sustained the objection, and defendant duly excepted, and asks the court to sign this his bill of exceptions, and that the same be made a part of the record, which is done this 20th day of May, 1881.

D. S. WADE, *Judge.*

And the same is made part of this statement.

The defendant then proposed to prove by said witness the truth of the matters alleged and set up in his answer, and read the same to the court. The court refused to permit the defendant to prove the said matters, on the ground that the said matters rested
13 in parol, and were not in writing. To which defendant then and there excepted.

There being no further evidence, the court instructed the jury as follows:

Instructions.

[No instructions.]

14 To the giving of which defendant then and there excepted.

15 The cause was then submitted to the jury, who returned the following verdict:

Verdict.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

We, the jury, find for the plaintiff in the sum of seventeen hun-

dred thirty-three & $\frac{30}{100}$ dollars as the amount due him for principal and interest.

FRED. GAMER, *Foreman.*

Thereupon the following judgment was then entered in the case:

Judgment on Verdict.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

This cause came regularly on for trial; the said parties appeared, by their respective attorneys; a jury of twelve persons were duly sworn and empaneled, and sworn to try said cause. Witnesses on the part of the defendant were duly sworn and examined. After the evidence and the instructions of the court, the jury retired
16 to consider of their verdict, under charge of a sworn officer, and subsequently returned into court, and, being called, each answered to their names, and say that they find for said plaintiff and against said defendant for the sum of seventeen hundred thirty-three & $\frac{30}{100}$ dollars. Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff do have and recover from said defendant the sum of seventeen hundred & thirty-three dollars and thirty cents, with interest thereon from date hereof until paid at the rate of ten per cent. per annum, together with plaintiff's costs herein incurred, taxed at the sum of —— dollars.

May 22, 1881.

And on the 28th day of May, 1881, the defendant filed his notice of motion for a new trial herein as follows:

Notice of Mo. for New Trial.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

The defendant hereby gives notice of his intention to move for a new trial in this cause, and that said motion will be based
17 upon bills of exception and a statement of the case, and he assigns the following errors:

1. Error in law occurring to the trial & excepted to by the defendant:

a. The court refused to permit the defendant to prove the agreement set out in his answer.

b. The court erred in refusing to permit defendant's witness to answer the questions asked by him. (See bill of exceptions.)

c. The court erred in giving the several instructions asked for by plaintiff, and in giving each one of the same.

CHUMASERO & CHADWICK,
Defendant's Attorneys.

Service of copy of above notice admitted this 28th day of May, 1881.

E. W. TOOLE,
Plaintiff's Attorney.

And the motion of defendant for a new trial herein coming on to be heard before the court, the same was, on consideration, overruled.

To which ruling of the court in overruling defendant's said
18 motion the defendant, by his counsel, then & there duly excepted.

Thereupon the defendant made & filed the following assignment of errors:

Assignment of Errors.

1. The court erred in refusing to allow the defendant to prove the contract, which he offered to prove, as shown by his bill of exceptions.

2. The court erred in refusing to allow the defendant to prove the truth of the matters set up in his answer.

The foregoing statement is correct.

D. S. WADE, *Judge.*

And on the 16th day of June, 1881, said defendant filed herein his notice of appeal, of which the following is a copy:

Notice of Appeal.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

You will please take notice that the defendant in the above-
19 entitled action hereby appeals to the supreme court of this Territory from the decision of the court overruling defendant's motion for new trial, and the judgment therein made and entered in the said district court on the 22d day of May, 1881, in favor of the plaintiff in said action and against said defendant, and from the whole thereof.

Dated this 14th day of June, 1881.

Yours, &c., CHUMASERO & CHADWICK,
Attorneys for Defendant.

To the CLERK of said district court and
TOOLE & TOOLE, att'ys for plaintiff.

Endorsement: "Due service and receipt of a copy hereof admitted after filing, this 16th day of June, 1881. E. W. Toole, att'y for appelle-.

And on the same day the defendant filed herein his undertaking on appeal, in words & figures following, to wit:

20 *Undertaking on Appeal.*

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JAMES M. RYAN *vs.* ELIJAH M. DUNPHY.

Whereas the defendant in the above-entitled action is about to

appeal to the supreme court of the Territory of Montana from a judgment made and entered against him in said action in the said district court in favor of the plaintiff in said action on the 22d day of May, A. D. 1881, for seventeen hundred and thirty-three dollars and thirty cents, and sixty-one dollars and eighty-five cents, costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Roman Kuehn and John R. Watson, of the county of Lewis & Clarke, and Territory of Montana, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will prosecute his appeal with effect, and will pay all damages and costs which may be awarded against him on the trial of the appeal, or on a dismissal thereof, not exceeding three hundred dollars: to which amount we acknowl-
21 edge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of $3,790.36, being double the amount named in the said judgment; that if the said judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the plaintiff the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant on the appeal.

Dated this 13th day of June, A. D. 1881.

ROMAN KUEHN. [SEAL.]
JOHN R. WATSON. [SEAL.]

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } ss:

Roman Kuehn and John R. Watson, the persons named in and who subscribed the foregoing undertaking as the sureties
22 thereto, being severally duly sworn, each for himself, says: That he is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the Territory of Montana.

ROMAN KUEHN.
JOHN R. WATSON.

Subscribed & sworn to before me, this 13th day of June, A. D. 1881.

WM. CHUMASERO,
Notary Public.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JAMES M. RYAN, Respondent,
vs.
ELIJAH M. DUNPHY, Appellant.

I, A. H. Beattie, clerk of said court, do hereby certify that the foregoing twenty pages, numbered from 1 to 20, inclusive, contain a full, true, and correct transcript of certain pleadings, records,
23 & proceeding filed, made, and had in the above-entitled action, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 24th day of June, 1881.

[SEAL] ALEX. A. BEATTIE, *Clerk.*

In the Supreme Court, Montana Territory. January Term, 1882.

JAMES M. RYAN, Respondent,
vs.
ELIJAH M. DUNPHY, Appellant.

Be it remembered that in the present term of January, A. D. 1882, this cause was brought into the supreme court of the territory of Montana by virtue of an appeal from the judgment rendered and entered in the court below, agreeably to the statute of said Territory and the rules of this court in such case made and provided, and was argued by counsel.

And afterwards, in the term of January, 1882, being the same term of said court at which said cause was entered, the same
24 came regularly on for decision and judgment on appeal, whereupon the court delivered its opinion in writing in the words and figures following, to wit:

In the Supreme Court of Montana Territory. January Term, 1882.

JAMES M. RYAN, Respondent,
vs.
ELIJAH M. DUNPHY, Appellant.

Appeal from Lewis & Clarke county, third judicial district.

Opinion of the court by GALBRAITH, asso. justice:

The complaint in this action is founded on a promissory note made by the appellant to the respondent, dated June 1, 1879, payable Dec. 1, 1879, for $1,511.50.

The answer of appellant admits the execution and delivery of the note, and also that the same has not been paid; but alleges, by way of cross-action and counter-claim, in substance, the following state of facts: That in February, 1879, the appellant was negotiating for the purchase of certain placer mining ground, with the water rights, flumes, and appurtenances owned by and in the possession of certain persons, Rumsey & Embry; that about this time
25 at the request of the respondent it was in substance agreed between the appellant and respondent that the appellant was

to effect the purchase of the above property upon the best terms possible, using his best judgment for the benefit of both parties. That the title thereto was to be taken in the name of the appellant, and that the respondent was not to be known in the transaction till the purchase was completed and the conveyances executed. That when the appellant obtained a title to said property he was to make to respondent a deed for the undivided one-third thereof, upon the execution and delivery of which the respondent was to pay to appellant the one-third of all moneys paid by him for such conveyance, and the one-half of all expenses paid out in and about the purchase. That on the 24th of February, 1879, the appellant obtained a deed from Embrey for his interest in the property, the consideration therefor being $2,600.00. That on the 26th day of July, 1879, the title from Rumsey for one-half of the property to the appellant also became perfected, and upon this day the appellant and wife executed a deed to respondent for an undivided one-third of said property, and the same was tendered to respondent,
26 and demand made for the payment of $1,935.61, being the amount claimed by respondent on account of the purchase and expenses in relation thereto. That the respondent denied the existence of the agreement, and refused to pay the money and receive the deed. The respondent filed his replication, denying the existence of the agreement, or that respondent was indebted to appellant in the sum claimed in the answer, or in any other sum whatever. Upon the trial, the appellant being placed upon the stand as a witness, was asked the following question:

"You will state whether, in the month of February, 1879, you entered into any contract or agreement with the plaintiff in regard to the purchase of the mining ground in Grizzly Gulch, Minnesota mining district, Lewis & Clarke county, Montana Territory."

This was the property set forth in the answer. To this question the witness answered: "I did enter into a contract with plaintiff verbally. There was no written agreement." The witness was then interrogated as follows: "You will state what the contract was?" To this question the respondent objected, "for the reason that
27 the agreement not being in writing is void by the statute of frauds."

The court sustained the objection. The exception to this ruling of the court presents the principal question for our decision.

It will be observed, in relation to the agreement set forth in the answer, and which was sought to be proved by the question propounded, that the property which was the subject thereof was real estate; that the appellant was to obtain it in his own name, and make the payment of the consideration therefor; that when the purchase was completed the respondent was to pay the appellant one-half the amount of the purchase money, who thereupon was to convey one-third of the property to respondent.

The money so paid by appellant was his own money, and it cannot be considered a loan or advance to the respondent. To take an agreement from the operation of the statute of frauds, and establish a resulting trust, the purchase money must be the property of the

party paying it at the time of the payment. The same rule prevails "where the party taking the deed pays his own money therefor, with the understanding or agreement that it may afterwards
28 be repaid and the land redeemed by him who sets up the trust."

The agreement was, therefore, a contract within the statute of frauds.

Secs. 160, 162, 176, & 177 of article 1, chap. 13, 5th division of Rev. Stat., 1879, p. 435 & 437. Brown on Stat. of Frauds, 4th ed., sec. 90; Kendall *vs.* Mann, 11th Allen, Mass., p. 15; Kellum *vs.* Smith, 33 Pa. St., 164; Jackman *vs.* Ringland, 4 W. & S., p. 149.

But it is claimed by the appellant that the "counter claim being an independent action for money paid, laid out, and expended by appellant at the instance and request of the respondent, the statute has no application." To this we think it would be sufficient to reply that the express contract being void by the statute of frauds the counter-claim founded thereon cannot be sustained. We understand it to be the general rule that the agreement must be mutual as to the remedy and obligation, and that a contract will not be enforced against a party who does not possess the power under the contract to enforce it upon his part. Upon this agreement the respondent could not bring a bill for its specific performance. It will be observed
29 that the appellant founds his counter-claim wholly upon the express contract alleged in his answer. Therefore, both the supposed bill in equity for specific performance by the respondent, and counter-claim in question are founded upon the same express verbal contract. No reason can we think be assigned for maintaining that contract which would not sustain a bill for specific performance, for the reason that it is void under the statute of frauds, would nevertheless in itself be sufficient to support an action or counter-claim for the recovery of the money paid out under its provisions. It was this express agreement alone which the appellant offered to prove upon the trial. It was only to the refusal of the court to allow proof of this agreement that the appellant excepted. The claim of appellant was based wholly upon the express agreement set forth in his answer. He does not claim the sum demanded, or any portion therof by virtue of any implied contract to pay for expenses incurred in and about the purchase. There is no claim in the answer upon what may be technically called a *quantum meruit* or *quantum valebat*. There is no statement of
30 facts which substantially establishes any such claim under our system of pleading. The proof was not offered for any other purpose than to sustain the allegations of the counter-claim and cross-action. It was the express contract alone which was put in issue by the pleadings. It will be presumed, therefore, that the court ruled upon the objection in view of the state of the pleadings. There was a replication denying the existence of the contract set forth in the answer. This required proof that the alleged agreement was in writing.

Brown on the Statute of Frauds, 4th ed., sec. 511. May *vs.* Sloan, 11 Otto, 231. 1 Maaks Van Sandvoords Pl., 674.

The court ruled correctly on the objection.
The judgment is affirmed, with costs.

D. S. WADE,
Chief Justice.
WM. J. GALBRAITH,
Asso. Justice.
E. J. CONGER,
Asso. Justice.

Thereupon judgment on appeal was entered in said cause, in the words and figures following, to wit:

31 *Judgment on Appeal.*

In the Supreme Court of Montana Territory. January Term, 1882.

JAMES M. RYAN, Respondent,
vs.
ELIJAH M. DUNPHY, Appellant.

This cause came regularly on to be heard before the court on the transcript of the record of the district court in said cause, which was brought into the supreme court of the Territory of Montana by virtue of an appeal agreeably to the statute of said Territory and the rules of said court in such case made and provided, and was argued by counsel. Whereupon it is now here ordered and adjudged by this court that the judgment of the court below, entered in said cause on the 22d day of May, 1881, be, and the same is hereby, affirmed, with costs. And it is hereby further ordered by the court that said respondent, James M. Ryan, recover against said defendant & appellant, Elijah Dunphy, —— dollars for his costs herein expended, & have execution therefor.

17 January, 1882.

32 And on the 22d day of February, 1882, the appellant sued out a writ of error to remove said cause to the Supreme Court of the United States to reverse the said judgment of the supreme court of Montana Territory herein, of which said writ of error the following is a copy, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said supreme court before you, in a suit between James M. Ryan, plaintiff, and Elijah M. Dunphy, defendant, a manifest error has happened, to the great damage of the said Elijah M. Dunphy, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedinge aforesaid, with all thinge concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the
33 same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable M. R. Waite, Chief Justice of the said Supreme Court, the fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by Hon. Decius S. Wade, chief justice of the Territory of Montana.

DECIUS S. WADE,
Chief Justice of Montana.

And on the same day, to wit, the 22d day of February, A. D. 1882, said appellant filed herein his citation to accompany said writ of error, of which said citation in words & figures the following is a copy, to wit:

34 *Citation.*

UNITED STATES OF AMERICA:

In Supreme Court.

ELIJAH M. DUNPHY, Plaintiff in Error,
vs.
JAMES M. RYAN, Defendant in Error.

You are hereby cited and admonished to be & appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Elijah M. Dunphy is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Decius S. Wade, chief justice of the supreme court of the Territory of Montana, this 15th day of February, A. D. 1882.

D. S. WADE,
Chief Justice.

35 Endorsement: Service of the above citation is hereby admitted and copy waived. Dated Feb'y 22, 1882. E. W. & J. K. Toole, plaintiff's attorneys.

And on the same day the said plaintiff in error filed herein his undertaking to accompany the foregoing writ of error & citation, of which the following is a copy, to wit:

Know all men by these presents, that we, John R. Watson and George H. Piatt, of the county of Lewis & Clarke, in the Territory of Montana, are held and firmly bound unto James M. Ryan in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said James M. Ryan, his executors, administrators, or assigns; for which payment, well and truly to be made we bind ourselves, our heirs, executors, & administrators jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 15th day of February, one thousand eight hundred and eighty-two.

Whereas lately at a supreme court in and for the Terri-
36 tory of Montana, in a suit depending in said court between James M. Ryan, plaintiff, and Elijah M. Dunphy, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error, & filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said James M. Ryan, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next: Now, the condition of the above obligation is such that if the said Elijah M. Dunphy, above named, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN R. WATSON. [SEAL.]
GEO. H. PIATT. [SEAL.]

Signed, sealed, & delivered in the presence of—

—— ——.

Approved by—
DECIUS S. WADE,
Chief Justice of Sup. C't, Montana Territory.

TERRITORY OF MONTANA, }
Lewis & Clarke County, } ss:

37 John R. Watson & Geo. H. Piatt, the obligees within named, being severally duly sworn, each for himself, says: That he is a resident of the Territory of Montana, and that he is worth the sum named in the within bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

JOHN R. WATSON.
GEO. H. PIATT.

Subscribed and sworn to before me, this 16th day of February, A. D. 1882.

[SEAL.] W. F. CHADWICK,
Notary Public.

38 In the Supreme Court, Montana Territory.

ELIJAH M. DUNPHY, Plaintiff in Error,

vs.

JAMES M. RYAN, Defendant in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing is a true & correct transcript of certain pleadings, records, and proceedings filed, made, & had in said court in the above-entitled cause, as the same are of record and on file in my office.

Witness my hand & official seal hereto affixed, this 19th day of Sept., 1882.

[SEAL.] ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory sup. court. No. 387. Elijah M. Dunphy, plaintiff in error, *vs.* James M. Ryan. Filed 14th October, 1882.

FILED
NOV 16 1885
JAMES H. McKINNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 114.

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs.

JAMES M. RYAN.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

M. F. MORRIS,
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 114.

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs.

JAMES M. RYAN.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

The defendant in error sued in one of the district courts of the Territory on a promissory note for $1,511.50. The plaintiff in error admitted his indebtedness on the note, but pleaded, by way of set-off, an indebtedness to him from the defendant in error amounting to $1,935.61, for money expended by him at the request of the defendant in error and for his use, in the purchase of certain mining property, under a verbal agreement between them. This agreement was, in effect, that the plaintiff in error should negotiate

for the property, and purchase it in his own name, as the defendant in error did not wish to be known in the transaction; and then the defendant in error would take one-half of it from him, and reimburse to him one-half of the amount of his expenditure. The plaintiff in error fully complied with his part of the agreement, purchased the property, took the title to himself, then tendered a deed for one-half to the defendant in error, and demanded to be reimbursed one-half of the purchase-money. The defendant in error refused to comply with the demand, and declined to receive the deed, on the ground that the contract, being one in relation to lands, was void under the Statute of Frauds. The district court agreed with him, and ruled out the set-off, and directed judgment to be entered for the defendant in error to the full amount of the promissory note.

The Supreme Court of the Territory affirmed the decision; and to reverse its judgment this writ of error is sued out.

II.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the contract between the parties was so far void under the Statute of Frauds that the plaintiff in error could not recover from the defendant in error the money expended by the former in pursuance of the contract for the use of the latter and at his request.

2. The court below erred in holding that, notwithstanding the full performance of the contract by the plaintiff in error, he was not entitled to recover from the defendant in error the money payable as the consideration of the contract.

3. The court below erred in holding that the contract between the plaintiff and the defendant was void under the Statute of Frauds.

4. The court below erred in not holding that, even if the contract in question was void under the Statute of Frauds, the performance of it by the plaintiff in error entitled him to compensation for the money therein expended by him on account of the defendant in error.

III.

BRIEF OF ARGUMENT.

1.

Whether the set-off or counter-claim interposed as a defense in this case is a legal or merely an equitable one is a matter of no consequence, since, under the statute law of Montana, common law and equity procedure are blended.

The Civil Practice Act of Montana of 1867, Sec. 1, provides: "There shall be in this Territory but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs."

Chap. IV, Sec. 87: "The answer of the defendant shall contain, 1st, a specific denial of the material allegations of the complainant controverted by the defendant; 2d, a statement of any new matter constituting a defense or counter-claim."

Chap. IV, Sec. 88: "The counter-claim mentioned in the last section shall be one * * * arising out of one of the following causes of action: 1st, a cause of action arising out of the transactions set forth in the complaint; * * * 2d in an action arising upon contract any other cause of action arising also upon contract, and existing at the commencement of the action."

In the case of Hornbuckle *vs.* Toombs (18 Wallace, 648), this court definitively recognized the right of the Territorial Legislature so to combine common law and equity.

2.

The Statute of Frauds of 29 Charles II has been re-enacted in Montana with some modification. The territorial statute reads as follows, so far as it bears on this subject:

"Every contract for the leasing for a longer term than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract or some note or memorandum thereof expressing the consideration be in writing, and be subscribed by the party by whom the lease or sale is to be made." (Code of Montana of 1879, Chap. XII, Sec. 162.)

The Statute of Charles II provided that the agreement or memorandum should be signed by the party to be charged therewith. The Statute of Montana, it will be noticed, requires signature only by the lessor or vendor, and therefore seems to imply that, as to the lessee or purchaser, no writing is necessary.

3.

It would appear as if the territorial court had treated the case of the plaintiff in error as though it were one for the specific performance of a verbal contract for the sale and and purchase of lands. It is respectfully submitted. 1st, that this is not the correct view of the cause; and 2d, that even if it were, the plaintiff in error was entitled to recover.

The claim is not for the specific performance of the contract, but for compensation to the plaintiff in error for money expended by him for the use of the defendant in error and at his request. Whether the contract is one which the defendant in error could have enforced is not the question; nor is it the question whether the contract could have been directly enforced by either party to it. The question is, whether, when the defendant in error has requested and induced the plaintiff in error to expend money for him and

for his benefit, the plaintiff in error is not entitled to recover for it the amount so expended by him.

It does not appear that it should make any difference whether the enterprise in which the money has been expended is a valid or invalid one, provided it be not illegal; it is not for the defendant in error to raise that question. One of the ordinary grounds of the action of *assumpsit* is for "money paid by the plaintiff for the defendant at his request." And it would be strange, indeed, if after such request and payment by the plaintiff, the defendant should be allowed to say that the transaction was of no benefit to him, or that the transaction was one which he could not have compelled the plaintiff to perform, or that there should have been written evidence between himself and the plaintiff before the latter was induced to part with his money.

The contract in question is plainly not such a one as is contemplated by the Statute of Frauds. It is not a contract by the plaintiff to sell his lands to the defendant, but a contract that, if the plaintiff would buy lands from a third person, the defendant would reimburse to him one-half of the expenditure and take one-half of the lands. The plaintiff did the act which he agreed to do, and he now asks for his compensation. The defendant induced him to part with money for his (the defendant's) benefit; and he refuses to repay him. If this is law, it is scarcely morality. But it is not law; for the Statute of Frauds requires no such construction.

4.

The rule that governs this class of cases has been well stated by a recent elementary writer, Bishop on Contracts, (Secs. 503, 535, 545):

"If one has voluntarily done a thing which, being within the statute, he could not have been compelled to do, he may enforce payment of it—that is, recover the consideration orally agreed—from the other."

And again: "If a conveyance is actually made, any oral promise to pay for the land is good."

And this is the tenor of all the authorities on the subject.

Phillips *vs.* Thompson, 1 Johnson's Ch., 131.
Parkhurst *vs.* Van Cortlandt, 1 Johns. Ch., 273.
Baker *vs.* Wainwright, 36 Md., 336.
Green *vs.* Drummond, 31 Md., 71.
Nutting *vs.* Dickinson, 8 Allen, 544.
Philbrook *vs.* Belknap, 6 Vt., 383.
Ray *vs.* Young, 13 Texas, 550.
Zabel *vs.* Schroeder, 35 Texas, 308.
Sims *vs.* McEwen, 27 Ala., 184.
Knowlman *vs.* Bluett, Law Rep., 9 Exch., 1.
Swain *vs.* Seamens, 9 Wall., 254.

The case of Baker *vs.* Wainwright (36 Md., 336) is almost precisely in point. In that case, after an exhaustive review of all the authorities, the Court of Appeals of Maryland said:

"The contract upon which the liability of the defendants arises is not one involving the title to land. It is simply a contract of agency, under which the plaintiff as agent has incurred loss and expense, for which he seeks compensation. Judge Story, in his work on Agency, Sec. 339, says: 'If an agent has, without his own fault, incurred losses or damages in the course of transacting the business of his principal, he will be entitled to full compensation therefor.'

"In this case, the business and employment of the agent, it is true, was to purchase land; but this does not bring the case within the fourth section of the statute. The purchase of land was a matter collateral to the contract, which constituted the relation of principal and agent between the parties, and on which the liability arises. To prove this contract, written proof is not necessary. * * * *

"If an agent for this purpose can be legally constituted by parol, it would seem to follow logically that, when so

appointed, he would be entitled to recover compensation and indemnity for his services rendered, and for his costs and expenses incurred in attending to the business of his principal, and that the principal cannot escape his liability upon the ground that the contract which the agent has been authorized to make is within the Statute of Frauds, and must be evidenced by writing."

So that, as here indicated, the fundamental question involved is the existence or non-existence of agency; and for this parol proof is always admissible (Ford *vs.* Williams, 21 Howard, 287). If the plaintiff in error acted as the agent of the defendant in error, the latter is liable to the former upon the contract of agency. That there was a contract of agency, under which and in pursuance of which the plaintiff in error expended money and incurred expense, is clear from the Record (page 2), where it is expressly stated that the agreement between the parties was that the plaintiff in error "was to effect the purchase of two-thirds of the above-described property upon the best terms possible, exercising and using his best judgment, for the joint use and benefit of said plaintiff and defendant." It is clear, therefore, that, as to one-half of the interest, the plaintiff in error was to act as agent of the defendant in error, while as to the other half he was a principal. And it is equally clear that, being such agent, he was entitled to compensation for his expenditures, made by him for the use and benefit of his principal.

5.

No doubt it will be objected here, as it was in the court below, if we may judge from the opinion filed in the case (Record, p. 10), that in order to "establish a resulting trust the purchase-money must be the property of the party paying it at the time of payment;" in other words, that if the plaintiff in error pays his own money, and not that of the defendant in error, there is no resulting trust, and no relation

of principal and agent. But the answer to this is, that, if the plaintiff in error advances his own money for the use and benefit of the defendant in error, the payment is a loan to the latter in contemplation of law, and thereby becomes the money of the defendant in error. This distinction runs through all the cases. And the criterion of distinction is that the resulting trust must attach at the time of purchase or not at all; that the right of the beneficiary must then be perfect, and that there is to be no option to be exercised by either party thereafter. Now, that was precisely the case here. The plaintiff in error did not pay the money on his own account, but on account of the defendant in error. There was no option to be exercised afterwards by either. Their respective rights were fixed when the purchase was made by the plaintiff in error.

6.

It seems to be objected, also, that, if the express contract of the defendant in error to repay the plaintiff in error was void, as is contended, no implied contract can be presumed on which to base a recovery.

There is a very great amount of absurd reasoning on this subject. The whole thing lies in a nut-shell. Where the parties make an express provision for themselves, different from that which the law would imply had they been silent, the law will not imply a contract. But where the parties expressly contract in the same terms which the law would imply if they had been silent, the express contract may be regarded as surplusage, and the implied contract will stand. Parsons on Contracts, Vol. 2, p. 27.

It is also objected that for want of mutuality the defendant in error cannot be held. It is argued that, because he could not have compelled specific performance by the plaintiff in error, the latter cannot hold him to the payment of the consideration.

This position utterly ignores the distinction well-established between executed and executory contracts; and it is not deemed necessary to do more than state it to show its fallaciousness.

7.

Even if this case were to be treated as a suit for specific performance, the court below was wrong in holding that it could not be maintained.

Why can it not be maintained? There is here the part performance, the full performance indeed, by the one party, which has always been held by this court, the courts of England, and most of our State courts, to take a case out of the operation of the Statute of Frauds.

Wherever a contract, which, while executory, could not be enforced on account of the Statute of Frauds, has in fact been fully executed on the one side, and nothing remains to be done but the payment of the consideration by the other party, and that consideration is presently payable, the consideration can always be recovered.

(See authorities heretofore cited.)

8.

It is submitted that the plaintiff in error ought to have been allowed to prove his counter-claim, and that the judgment below should now be vacated, and the case remanded for a new trial.

M. F. Morris,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
NOV 20 1885
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 114.

ELIJAH M. DUNPHY,
Plaintiff in Error,

vs.

JAMES M. RYAN.

In Error to the Supreme Court of Montana Territory.

BRIEF OF EDWIN W. TOOLE AND JOSEPH K. TOOLE, OF COUNSEL FOR RESPONDENT.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1885.

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs.

JAMES M. RYAN.

In Error to the Supreme Court of Montana Territory.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The complaint in this action is based upon a promissory note made by the appellant to the respondent, dated June 1, 1879, payable December 1, 1879, for $1,511.50.

The answer of appellant admits the execution and delivery of the note, and also that the same has not been paid but alleges by way of cross-action and counter-claim in substance the following state of facts:

That in February, 1879, the appellant was negotiating for the purchase of certain placer-mining ground, owned by and in the possession of certain persons, Rumsey & Embry; that about this time, at the request of respondent, it was (in substance) agreed between appellant and respondent that the appellant was to effect a purchase of said property upon the best terms possible, using his best judgment for

Supreme Court of the United States.

OCTOBER TERM, 1885.

ELIJAH M. DUNPHY, PLAINTIFF IN ERROR,

vs.

JAMES M. RYAN.

In Error to the Supreme Court of Montana Territory.

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the benefit of both parties; that the title thereto was to be taken in the name of appellant, and that the respondent was not to be known in the transaction till the purchase was completed and the conveyance executed; that when appellant obtained title he was to make to respondent a deed for the undivided one-third, upon the execution and delivery of which the respondent was to pay to appellant the one-third of all moneys paid by him for such conveyance and the one-half of all expenses paid out in and about the purchase; that on the 24th of February, 1879, appellant obtained a deed from Embry for his interest in the property, the consideration therefor being $2,600. That on July 26, 1879, the title from Rumsey for his interest also became perfected, and upon this day the appellant and his wife executed a deed to respondent for an undivided one-third of said property, and the same was tendered to respondent and demand made for the payment of $1,935.61, being the amount claimed by appellant on account of the purchase and expenses in relation thereto; that respondent denied the existence of the agreement and refused to pay the money and receive the deed. The respondent filed his replication, denying the existence of the agreement, or that respondent was indebted to appellant in any sum whatever. Upon the trial, appellant, being placed upon the stand as a witness, was asked the following question: "You will state whether, in the month of February, 1879, you entered into any contract or agreement with the plaintiff in regard to the purchase of the mining ground in Grizzley Gulch, Minnesota, Mining District, Lewis and Clarke county, Montana Territory." This was the property mentioned in the answer. To this ques- the witness answered: "I did enter into a contract with

plaintiff verbally. There was no written agreement." The witness was then interrogated as follows:

"You will state what the contract was." To this question the respondent objected, for the reason that the agreement, not being in writing, is void by the statute of frauds. The court sustained the objection.

The exception to this ruling presents the only question for the consideration of this court.

Brief of Argument.

The cross-complaint and counter-claim in this case is based upon the contract. It alleges what it was and seeks to enforce it against respondent by reason of a compliance on the part of appellant. It was the contract so set up that was sought to be proven on the trial, and to the refusal of the court to allow *this, alone do the exceptions go.*

Where a party pays money or renders services to another upon a contract void under the statute of frauds, it has always been held that he can recover for money had and received, or upon a *quantum meruit.* But in such a case the contract is disregarded, and the action is based upon the *implied promise to* pay. An action upon *the contract* in this case can no more be maintained than it could upon *one* where it has only been partially performed by the complaining party. In such a case his remedy, if he has any, is upon a *quantum meruit* or *quantum valebat.* It is upon the *implied* promise to pay for the benefits received.

Without conceding that such an action could be maintained under the particular facts of this case, it is clear that the maintenance of the action set up in the cross-complaint must necessarily call to its support proof of the alleged con-

tract. It is emphatically a suit upon the *contract*, and the complaining party must stand or fall upon the establishment of it. Under the common counts evidence of a contract is sometimes admitted as tending to fix the amount for which a recovery can be had, but we believe that no well-considered case can be found where a recovery can be had under the common counts when the action is based upon an *express* contract. The *only point* embodied in the bill of exceptions to be considered is the ruling of the court in not allowing appellant to *prove his alleged contract*. We believe it will be found that the authorities cited by appellant, so far as they are at all in point, support the proposition here announced. (99 Mass., p. 360; Witherbee *vs.* Patten.) In addition to these we cite the court to the following, which we contend are conclusive of this case: Brown on Statute of Frauds, 3d ed., p. 122, sec. 124; Gray *vs.* Hill, R'y & Mood, p. 420, and authorities cited in notes 3 and 6; Browne on Statutes of frauds, *supra;* Fuller *vs.* Reed, 38 Cal., p. 99, *et seq.;* Pallen *vs.* Hicks, 43 Cal., p. 509, *et seq.;* Cooper *vs.* Pence, 21 Cal., p. 403, *et seq.;* Dungas *vs.* Parker, 52 N. Y., p. 494; Kidder *vs.* Hunt, 11 Am. Dec., p. 183.

The payment of the money in this case under any circumstances as disclosed is equivocal. It was not paid to respondent, but paid by appellant to third parties. It does not, therefore, raise an implied promise as if paid to respondent. In such a case it must be evidenced by writing. Huston *vs.* Townsend, 12 Am. R., p. 109.) Neither the land nor money was received by respondent, and he did no act or thing in furtherance of the alleged contract. There is no allegation or offer to prove that appellant would not have made the contract to purchase but for the agreement of re-

spondent, which is necessary, under any circumstances, to maintain any action. On the contrary, it appears he was negotiating the purchase, and was to and did use his judgment about it.

See Jackson *vs.* Murray, 17 Am. Dec., p. 58, and authorities cited in *note* on that page. As to the authority of an agent in cases cited, it is based upon a section of the statue of frauds at common law. The Montana statute is in the following words: Sec. 160, Revised Statutes of Montana, p. 435.

"No estate or interest in land other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or dedeclared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

Also, sec. 162, set out in appellant's brief. The words "by writing," in sec. 160 above quoted, were added to the English statute, and the decisions under it are made accordingly. The authorities cited by appellant are consequently inapplicable.

A very remarkable feature in the contract set out in the complaint and sought to be proved is that with reference to secrecy required to be observed by the parties in so far as respondent Ryan is concerned. No stronger case could be presented by which the provisions of the statute of frauds, concerning the sale of real estate, are made manifest and exemplified. No money passing from Ryan, no possession taken on delivery, and no writing signed by him, but, on the contrary, an oral agreement between the parties by which

secrecy is enjoined as to Ryan. If Dunphy was the agent of Ryan in the purchase, his agency must be *first established.* This can only be done by an instrument *in writing.* Sec. 160, Rev. Stat., Mont., *supra.*

Dunphy had it in his power when it was suggested that Ryan was not to be known in the contract to require the agreement to be reduced to writing and signed. This was his right and duty under the statute of frauds. He had the remedy at his command. Otherwise it was in his power by fraud and perjury to utterly ruin Ryan financially. As the case stands, Ryan's only protection and shield is the statute quoted. The following authorities will also be found in point:

Story on Partnership, p. 94, note A.
12 Wisconsin, 138, 153, 169.
9 Wisconsin, 397.
5 Vesey, 314.
4th Federal Reporter, 694.
Pacific Law Reporter of April 9th, 1885, p. 338.

There can be no resulting trust, because property was not purchased with funds of Ryan or partnership funds. It is emphatically an express trust sought to be created by parol and enforced by suit on the contract. The other point made by appellant in the court below, but not urged here, in reference to the pleading, is based upon the supposition that no replication had been filed. In this they were mistaken, and the authorities concur upon the point that, if the contract set out *is denied,* it puts the contract under the statute of frauds in issue as effectually as if pleaded; and when denied the party, of course, cannot go into proof of his parol agreement. (Brown on Statute of Frauds, 3d ed., 510,

511, and especially note 3, p. 487, and authorities there cited; May *vs.* Sloan, 11th Otto., 231, top page 237; Sugden on Vendors, 150–'4, sec. 6, par. 5.) We contend in this case that no action of any kind could be maintained by appellant. If money had been paid or services rendered to respondent under circumstances where he should repay it upon principles of common justice a remedy would be afforded upon his *implied* promise to do so.

But where he has received no benefit no implied promise arises. As in the case at bar the contract must necessarily be invoked to support the action. This cannot be done. It was in the power of appellant to have had the contract reduced to writing before he took any risk under it. For this purpose the statute of frauds was enacted. Any other course would expose the innocent and unsuspecting to the mercy of the unscrupulous and designing. If A can come to B and say to him, "You authorized me to buy this property of C; here is your deed for it. Now, pay me $50,000, the purchase price which you agreed to." Without any writing on the part of B or any act except in disaffirmance and denial of the engagement, then the bars to fraud, perjury, and injustice are thrown open and the fruits of honest toil and industry are always at the caprice of the indolent and dishonest. A bare thought of the consequences that might ensue is a sufficient reason for the law, if any was required.

We all call attention to the decision of the supreme court of Montana reported in Fourth Montana Report, p. 352.

EDWIN W. TOOLE, &
JOSEPH K. TOOLE,
Of Counsel for Respondent.